

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-556

MARCH TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Addison District Court
	}	Unit No. II, Addison Circuit
Stephen P. Bryant	}	
	}	DOCKET NO. 552-9-03 Ancr

In the above-entitled cause, the Clerk will enter:

The parties have filed a stipulation seeking to vacate the trial court order from which this appeal is taken for lack of jurisdiction. For the reasons set forth below, we accept the stipulation, and dismiss the appeal as moot.

Defendant was convicted of cultivation of marijuana, and sentenced, on June 9, 2005, to a term of one to two years, all suspended except for 45 days to serve. On June 22, 2005, defendant filed a notice of appeal. On September 9, 2005, defendant filed a motion for reconsideration of sentence with the trial court. The State opposed the motion, arguing, among other points, that the court lacked jurisdiction to consider the motion while the appeal was pending.

On September 19, 2006, this Court received a letter from defendant=s attorney requesting Aadvice on the logistics@ of the motion for reconsideration. Counsel was advised that he could withdraw the motion and proceed to disposition on the appeal, after which defendant would have 90 to days to re-file the motion in the event that the judgment was affirmed. See 13 V.S.A. 7042(a) (court may review sentence within 90 days after imposition, or within 90 days after entry of judgment by the Supreme Court); V.R.Cr.P. 35(b) (same1). On October 5, 2005, this Court received a letter from counsel stating that defendant had determined not to proceed with the motion for reconsideration until after the Court issued its decision on appeal.

Nothing in the record, however, indicates that counsel informed the trial court of defendant=s wish to withdraw the motion for reconsideration. On October 19, 2005, the court issued a written decision, denying the motion on the merits. On October 23, 2005, defendant filed a motion with this Court seeking an order to vacate the trial court decision. We denied the motion, observing that defendant had not shown that he lacked an adequate remedy in the trial court, through a motion to reconsider or vacate the ruling, or by way of appeal. Defendant thereafter filed a notice of appeal of the court=s decision.

The parties have now filed a motion seeking to vacate the trial court decision on the ground that it lacked jurisdiction. It is axiomatic that, subject to certain statutory exceptions, a proper notice of appeal from a final judgment of the trial court divests the lower court of jurisdiction as to all matters within the scope of the appeal. Kotz v. Kotz, 134 Vt. 36, 38 (1975). Courts construing the federal rule on which our own V.R.Cr.P. 35 is based have specifically ruled that the trial court is without jurisdiction to rule on a motion for reconsideration of sentence once a notice of appeal has been filed. United States v. Vroman, 997 F.2d 627, 627 (9th Cir. 1993); United States v. Ortega-Lopez, 988 F.2d 70, 71 (9th Cir. 1993). Although the trial court was apparently of the contrary view, believing that it was irrational to compel defendants to choose to forfeit either an appeal or a motion for reconsideration, the availability of sentence

review within 90 days after a decision by this Court on appeal obviates the need for such a choice.

Accordingly, we conclude that the trial court lacked jurisdiction to issue the order denying defendant=s motion for reconsideration of sentence. The order is therefore vacated, and the appeal is dismissed as moot.

FOR THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice